BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

QUANETT T. JOHNSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,002,342
CESSNA AIRCRAFT CO.	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the November 24, 2003 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on May 18, 2004, in Wichita, Kansas.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a series of repetitive traumas to the upper extremities, neck, and upper back that claimant sustained while working for respondent from October 27, 2001, through March 7, 2003, when she left work on medical disability. In the November 24, 2003 Award, Judge Clark determined the appropriate date of accident for purposes of computing claimant's award was June 6, 2002, which was the date claimant underwent right carpal tunnel release surgery.

Judge Clark awarded claimant permanent partial disability benefits for a 17 percent whole body functional impairment until March 7, 2003, followed by a 78.5 percent work disability (a permanent partial general disability greater than the whole body functional impairment rating). In determining claimant's work disability, the Judge found claimant had sustained a 57 percent task loss and a 100 percent wage loss.

Respondent contends Judge Clark erred. Instead of June 6, 2002, respondent argues the appropriate date of accident is claimant's last day of work on March 7, 2003. Further, respondent argues claimant sustained only a scheduled injury to the right upper extremity. In the alternative, respondent argues claimant failed to make a good faith effort to find appropriate work and, therefore, a post-injury wage of $484.80 should be imputed for purposes of computing her work disability.

Respondent requests this Board to award claimant permanent disability benefits for a 7.05 percent scheduled injury to the right arm. In the alternative, respondent asks the Board to reduce claimant's work disability to 25.05 percent, which is derived by averaging a 41 percent wage loss with a 9.1 percent task loss.

Conversely, claimant requests the Board to affirm the Award.

The only issues before the Board on this appeal are:

1. What is the appropriate date of accident for computing claimant's award?

2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Respondent employed claimant as a sheet metal assembler. In September 2001, after working for respondent approximately four years, claimant began having symptoms in her hands, elbows, shoulders, neck, and upper back.

According to the history obtained by Dr. Paul S. Stein, whom the Judge selected to perform an independent medical evaluation, in August 2001 claimant began performing more strenuous work that required more repetitive activity. Dr. Stein's February 14, 2003 report to Judge Clark reads, in part:

> Ms. Johnson started working at Cessna in 1997. She has done essentially the same job since employment except that around August of 2001 she was required to do a specific activity on a regular basis that she had only previously done occasionally. This was assembly of a large, awkward construct which required more repetitive activity in more strenuous positions. She started to develop pain and soreness in her hands, arms, shoulders and upper back. On September 26th

> the pain got to the point where she could not tolerate it and she went to health services. . . .[1]

Claimant reported her symptoms to respondent and began receiving medical treatment.

Claimant initially received medical treatment from the company doctor. The medical records compiled by respondent's medical department during September and October note claimant was complaining of intermittent numbness in both upper extremities, the left greater than the right, that she related to working with parts which were larger and bulkier than usual. Those records also note complaints of persistent shoulder pain and tenderness over both AC joints.[2]

After seeing at least two other doctors, in mid-April 2002 claimant began treating with Dr. J. Mark Melhorn. At that first visit, Dr. Melhorn noted claimant had complaints in both hands, arms, and upper extremities. The doctor noted claimant initially reported her bilateral upper extremity pain to respondent's medical department because of difficulties raising her left arm. After the initial exam, Dr. Melhorn diagnosed right carpal tunnel syndrome, painful right and left upper extremities, and left shoulder rotator cuff tendinitis.

After a series of injections to the right wrist and left shoulder, in May 2002 Dr. Melhorn recommended surgery on the right wrist and, depending on the outcome of the right wrist surgery, possible surgery on the left wrist. On June 6, 2002, Dr. Melhorn performed wrist surgery on claimant, releasing her right carpal tunnel.

Following surgery, Dr. Melhorn's attention turned to treating claimant's right elbow complaints and her bilateral shoulder complaints. Consequently, the doctor administered more injections. The doctor treated claimant through August 15, 2002, when he released her with the following permanent work restrictions:

> Regular work limit bucking, riveting, drilling, 30 minutes or less per 1 hour and repeat. Limit right and left hands over shoulder.[3]

The record is not entirely clear but it appears respondent transferred claimant to a different department in either November or December 2001. According to claimant, she was given modified duty for a period of time and then returned to her regular job duties until sometime in February 2002, when she experienced a pop in her left shoulder while

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[1] Stein Depo., Ex. 1 at 1.

[2] Stein Depo., Ex. 1 at 2.

[3] See Melhorn Depo., Ex. 2.

washing a pan at home. Sometime after that incident, respondent accommodated claimant's injuries by moving her to lighter work assembling small parts. Claimant believed assembling small parts was easier as the parts weighed less, the small parts required neither shooting nor bucking rivets, and she had less exposure to vibrating tools.

Claimant performed the accommodated job until March 7, 2003, when she was placed on medical leave after respondent determined it would no longer accommodate her injuries.

Claimant began drawing unemployment benefits and began looking for other work. At the time of the July 8, 2003 regular hearing, claimant remained unemployed. According to claimant, she has kept in contact with respondent's Career Development program by calling in once a month and going into the plant every week to check for jobs. Additionally, at the regular hearing, claimant introduced a list of 70 contacts she had made with potential employers during the month before the hearing. In addition to the contacts listed, claimant had made other contacts but was not aware she should have been keeping a written list. Consequently, the record discloses neither the names nor the number of contacts claimant made with potential employers between the date of her medical leave in early March 2003 and early June 2003 when she began recording her job contacts.

The record contains several opinions regarding the nature and extent of claimant's functional impairment along with several opinions concerning claimant's loss of ability to perform former work tasks. Dr. Melhorn, who is a board-certified orthopedic surgeon, rated claimant as having a 7.05 percent functional impairment to her right forearm under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.).

Vocational expert Dan R. Zumalt prepared a list of work tasks that claimant performed in the 15-year period before developing symptoms in September 2001. After reviewing that list, Dr. Melhorn determined claimant lost the ability to perform five of the 22 non-duplicated tasks, or approximately 23 percent.[4] However, the doctor also reviewed a second list of former work tasks prepared by Mr. Zumalt that allegedly contained the respondent's description of claimant's work tasks and, over claimant's objection, testified claimant had lost the ability to perform only two of the 22 tasks, or approximately nine percent.[5]

On the other hand, claimant's expert medical witness, Dr. Pedro A. Murati, diagnosed claimant as having a right carpal tunnel syndrome release, left carpal tunnel

[4] Melhorn Depo. at 11.

[5] *Id.* at 14.

syndrome and myofascial pain syndrome affecting her shoulders and cervical spine. Dr. Murati, who examined claimant in September 2002, rated claimant as having a 12 percent right upper extremity impairment, a 15 percent left upper extremity impairment and a five percent whole body functional impairment for the cervicothoracic spine, all of which combine for a 19 percent whole body functional impairment under the AMA *Guides* (4th ed.).

Dr. Murati, who is board-certified in rehabilitation and physical medicine and who practices pain management, recommended claimant refrain from climbing ladders; crawling; heavy grasping with either hand; above shoulder work with either hand or arm; lifting, carrying, pushing, or pulling more than 20 pounds with either arm; frequent repetitive grasping or grabbing with either arm; constant repetitive hand controls with either arm; working more than 18 inches away from the body with either arm; using hooks or knives with either arm; and using vibrating tools with either arm.

After reviewing a list of former work tasks prepared by labor market expert Jerry D. Hardin, Dr. Murati indicated claimant had lost the ability to perform 17 of 44 tasks, or approximately 39 percent. Dr. Murati adopted Mr. Hardin's task loss analysis. However, Mr. Hardin testified five days after Dr. Murati testified. And according to Mr. Hardin, his task list contained 19 duplicate tasks. The Board finds that by eliminating the 19 duplicate tasks, Dr. Murati's task loss opinion is modified to 52 percent.

The third opinion regarding claimant's functional impairment was presented by Dr. Stein, the board-certified neurosurgeon whom the Judge selected to evaluate claimant. The doctor examined claimant in February 2003 and diagnosed bilateral carpal tunnel syndrome and bilateral shoulder tendinitis, which the doctor rated as comprising a 17 percent whole body functional impairment under the *Guides* (4th ed.).

Dr. Stein recommended claimant avoid repetitive activity with her hands, repetitive work at shoulder level or above, and activities requiring the hands consistently to be more than 18 inches from the body. The doctor reviewed Mr. Zumalt's task list and determined claimant should no longer perform 10 of the 22 non-duplicated tasks, or 45 percent. After reviewing 22 of the 25 tasks from Mr. Hardin's list of non-duplicated tasks, Dr. Stein indicated claimant was unable to perform 12 of the 22 tasks, or approximately 55 percent. Adjusting that task loss to account for the three non-duplicated tasks that were not presented to Dr. Stein and, thus, not determined to be eliminated by the doctor's permanent work restrictions yields a 48 percent task loss.

The Board affirms the Judge's finding that claimant has sustained a 17 percent whole body functional impairment. The Board agrees with the Judge that Dr. Stein's opinions regarding claimant's injuries and functional impairment are the most persuasive. On the other hand, the Board rejects Dr. Melhorn's opinions. It is inconsistent that Dr. Melhorn treated claimant's shoulders with injections and also considered performing a left

carpal tunnel release surgery on claimant but, despite claimant's continuing symptoms in those parts of her body, only rated the right wrist and forearm.

CONCLUSIONS OF LAW

The Award should be modified to reduce claimant's work disability to 75 percent.

Date of accident for computing claimant's award

The Judge determined the appropriate date of accident for claimant's injuries was when she left work for the right carpal tunnel surgery. Under these facts, the Board finds no reason to disturb that finding as the record indicates claimant returned to work following that surgery to a much easier accommodated job, where she worked until respondent stopped providing accommodated work.

According to claimant, in her accommodated job she was able to avoid vibrating tools, bucking rivets, and lifting heavy weights. Further, both Dr. Murati and Dr. Stein evaluated claimant while she was performing her accommodated job. Neither doctor indicated claimant should be restricted from performing the accommodated work nor that they were even concerned about the accommodated duties. Moreover, there is no medical expert opinion in the record that claimant's accommodated job duties caused her any additional physical injury.

Following creation of the bright line rule in the 1994 *Berry*[6] decision, the Kansas appellate courts have grappled with determining the date of accident for repetitive use injuries. In the 1999 *Treaster*[7] decision, the Kansas Supreme Court held the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. Accordingly, *Treaster* focuses upon the offending work activity that caused the worker's injury.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[8]

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[6] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[7] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[8] *Id.* at Syl. ¶ 3.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[9]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

In the case at hand, claimant left work not due to the symptoms from her injuries but, instead, due to respondent's decision to stop accommodating her injuries. As indicated above, the Board is not compelled to disturb the Judge's finding regarding the date of accident for purposes of computing claimant's award for the repetitive micro-trauma injuries that claimant sustained. Consequently, the Board adopts June 6, 2002, as the date of accident in this claim.

Nature and extent of injury and disability

Due to the nature of claimant's injuries, she is entitled to receive permanent partial general disability benefits as defined by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross**

[9] *Id.* at Syl. ¶ 4.

> **weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[10] and *Copeland*.[11] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual post-injury wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[12]

According to the Award, the parties stipulated claimant's pre-injury wage was $675.41 through March 7, 2003, when she was placed on medical leave, and $822.79 after that date.

The Judge determined claimant made a good faith effort to find work following her layoff. The Board agrees. Accordingly, claimant's wage loss for the permanent partial general disability formula is 100 percent.

The Board concludes claimant has sustained a 49 percent task loss. That percentage is derived by averaging Dr. Stein's 46.5 percent task loss opinion (45 percent considering Mr. Zumalt's list of non-duplicated tasks and 48 percent considering Mr. Hardin's list of non-duplicated tasks) with Dr. Murati's 52 percent task loss opinion.

Averaging claimant's 100 percent wage loss with her 49 percent task loss creates a 75 percent work disability for the period commencing March 8, 2003. Before that date, claimant's permanent partial general disability is limited to her 17 percent whole body functional impairment rating.

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[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[12] *Id.* at 320.

AWARD

WHEREFORE, the Board modifies the November 24, 2003 Award and decreases claimant's work disability to 75 percent.

Quanett T. Johnson is granted compensation from Cessna Aircraft Co. for a June 6, 2002 accident and resulting disability. For the period from June 6, 2002, through March 7, 2003, Ms. Johnson is entitled to receive 39.14 weeks of permanent partial general disability benefits at $417 per week, or $16,321.38, for a 17 percent permanent partial general disability.

Commencing March 8, 2003, Ms. Johnson is entitled to receive 200.67 weeks of permanent partial general disability benefits at $417 per week, or $83,678.62, for a 75 percent permanent partial general disability and a total award not to exceed $100,000.

As of May 25, 2004, Ms. Johnson is entitled to receive 102.71 weeks of permanent partial general disability benefits at $417 per week, or $42,830.07, for a total due and owing of $42,830.07, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $57,169.93 shall be paid at $417 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director